UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

David Lane Johnson, Plaintiff, -v- National Football League Players Association, et al., Defendants.	No. 1:17-cv-05131 (RJS) Judge Richard J. Sullivan

Plaintiff David Lane Johnson's Reply to the NFL Defendants' Opposition to Plaintiff's Motion to Vacate the Arbitration Award

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INTRODUCTION

Defendants the National Football League and the National Football League Management Council (jointly, "NFL") have spent years asking courts to strictly enforce the terms of its collective bargaining agreements with Defendant the National Football League Players Association ("NFLPA"). *See*, e.g., *NFL Mgmt. Council v. NFL Players Ass'n*, 820 F.3d 527, 547 (2d Cir. 2016) ("*Brady*") ("no fundamental unfairness in affording the parties precisely what they agreed on"); *NFL Players Ass'n v. NFL*, 831 F.3d 985, 998 (8th Cir. 2016) (the parties are bound to the procedure for which they bargained). Plaintiff Lane Johnson sought just that -- for Defendants and arbitrator James Carter to apply the express terms of the collectively bargained NFL Policy on Performance-Enhancing Substances 2015 (the "Policy"). However, Defendants and Carter bastardized the Policy's written terms to such a degree that his entire arbitration process was irreparably broken and the resulting arbitration award ("Award") is a farce.

This bastardization of the Policy's provisions, many of which protected players like Johnson, has caused the NFL to abandon its typical strict compliance arguments. Instead, it asks the Court to allow an arbitrator to ignore and rewrite plain and express collectively bargained terms with virtually unfettered discretion. To this end, the NFL glosses over the following:

- Carter's improper appointment to serve as an arbitrator;
- Defendants' and Carter's refusal to provide Johnson with any information concerning the arbitrator assignment process or Policy arbitrators;
- Carter's acceptance of a proffer of evidence without providing Johnson an opportunity to see the purported Policy modification;
- Carter's complete disregard of the Policy's burden-shifting paradigm at the heart of the Policy's appeal process; and,
- Carter's Order requiring the NFL to produce the Policy's procedures and protocols, which he allowed the NFL to ignore without consequence.

The NFL's Opposition makes clear that it is unable to defend, let alone explain, the numerous substantive, material deviations from the Policy's express terms.

The immediate and collateral consequences of the NFL's proposed standard of review are staggering. A court's application of the NFL's proposed standard would render the words of collective bargaining agreements meaningless and allow arbitrators to dispense their own brand of industrial justice without fear of any review. This Court must protect the bedrock safeguards in both the Policy and the Labor Management Relations Act ("LMRA").

While Johnson contends that fundamental fairness is alive in the Second Circuit, the Court need not address this issue, as the Policy itself required "transparency" and "a fair system of adjudication." Doc. No. 39-1 at 1785 (emphasis added).[1] The NFL is bound by the Policy terms it negotiated. The sham proceeding Johnson received evidences a manifest disregard of the Policy and the resulting Award does not draw its essence from it. The NFL's inability to account for these failures demonstrates this case requires vacatur.

LAW AND ARGUMENT

I. AN AWARD RENDERED BY AN IMPROPERLY APPOINTED ARBITRATOR CANNOT DRAW ITS ESSENCE FROM THE POLICY

Defendants' failure to comply with the Policy's strict terms regarding arbitrator selection and competence denied Carter authority to hear Johnson's appeal. The NFL admitted that the Policy Johnson attached to his Amended Complaint (Doc. No. 39-1) is the applicable Policy. *See* Doc. No. 103 at ¶ 24; Doc. No. 39 at ¶ 24. Yet, the Policy does not include any of the alleged amendments the NFL suggests exist in its Opposition (Doc. No. 111). Nor does the NFL attach any of these alleged amendments to its Opposition or even so much as a sworn statement that such amendments exist. Quite simply, no record evidence demonstrates that such Policy amendments exist and the NFL's reliance on them to save the Award is without merit.

[1] Johnson cites to the page numbers in the top right corner of the document.

A. Defendants Appointed Carter in Violation of Express Policy Terms

Carter could not have acted within the scope of his authority, because his appointment to hear Johnson's appeal violated the Policy (i.e., he had no authority to issue the Award). Despite the NFL's protestations, neither of the two purported arbitrators available to hear Johnson's appeal was properly seated under the express Policy terms.

Defendants selected Glenn Wong and Carter as the only two arbitrators under both the Policy and the NFL Policy and Program on Substances of Abuse ("SOA"). *See* Doc. No. 116-9; Doc. No. 116-12; Doc. No. 111 at 9. While the SOA Policy and the Policy are similar, they are distinct policies and separately defined. Doc. No. 39-1 at 1784 (Policy defined as only the "Policy on Performance-Enhancing Substances"); Doc. No. 116-11 at 4 (SOA Policy defined as only the "policy regarding substance abuse in the NFL"). The NFL provided no evidence the Defendants ever defined these policies collectively. Both policies separately require that the arbitrators selected to hear appeals under them are "not affiliated with the NFL, NFLPA or Clubs." Doc. No. 39-1 at 1796; Doc. No. 116-11 at 5.

The NFL admits it violated the Policy terms by not selecting the required minimum number of arbitrators. Doc. No. 111 at 9. Additionally, the NFL does not contest that at the time Carter heard Johnson's Policy appeal, he was "affiliated with" the NFL and the NFLPA because he acted as an arbitrator under the separately defined SOA Policy.

When explaining the Policy's arbitrator requirements (*see* Doc. No. 111 at 7-8), the NFL ignored the Policy's required process for designation of the Notice Arbitrator -- "[t]he selected group of arbitrators shall designate one of its members to be the Notice Arbitrator, who also will be responsible for assignment of the appeals." *See* Doc. No. 39-1 at 1796 (emphasis added).

Defendants also admitted they violated the Policy's Notice Arbitrator appointment provision by directly appointing Wong as the Notice Arbitrator. Doc. No. 116-9.

Furthermore, the Notice Arbitrator did not set the arbitration schedule. *See* Doc. No. 116-10 at 21:2-14 (NFL attorney Kevin Manara stated Defendants "set [the] schedule" and "assigned this case to [Wong]"). Defendants' seizure of the Notice Arbitrator's right to set the schedule also violated the Policy's clear terms concerning arbitrator selection.

The NFL previously tried to explain its failure to appoint the required number of arbitrators. During the 2016 proceedings arising in *Pennel Jr. v. NFLPA, et al.*, an NFL player challenged discipline under the SOA Policy on grounds that the required minimum of three arbitrators did not exist. *See* Ex. 3 (*Pennel* Complaint, without attachments). In *Pennel*, the Court asked the NFL about its failure to abide by the SOA's arbitrator provisions:

> What is the player to do in this case? What is the plaintiff to do if, in fact, hypothetically management and his union have chosen to either ignore or unilaterally decide not to abide by a provision in their agreement, because that's the argument they're making.
>
> They're saying, "Judge, here's why we're here is because management and the union have agreed they will not follow the specific provisions set forth in this policy, and they have told us that they have modified or agreed to a modification which we have not yet seen, which is not" -- at least no one has told me is in writing. No one has told me there's been -- "The proper protocol has been followed in getting the approval of the modification. So, therefore, Judge, where else can we go besides a federal court," if, in fact, the parties, again, hypothetically, their argument is that you have, you and the union, have chosen to modify this agreement in some fashion?

See Ex. 4 (excerpts of transcript from *Pennel* hearing) at 24:20-25:11.

In its explanation before the *Pennel* Court, the NFL asserted that its failure to appoint the required minimum three arbitrators somehow was not an SOA Policy "modification." Ex. 4 at 31:12-33:21. The NFL's position that players had no right to see alleged modifications to a collectively bargained agreement particularly struck the *Pennel* Court:

> Again, I guess my head is spinning that you can enter into an agreement and make a modification and then not disclose it to anyone. I mean, the plaintiff is subject to the terms of this agreement. And if, in fact, you've reached some modification with the union and then to say to the plaintiff, who is subject to the arbitration, is not entitled to know about the modifications that we've reached and the details of same, strikes me as almost a lack of fundamental fairness, and I just quite frankly don't understand that argument.

Ex. 4 at 37:22-38:8.

Much like Pennel, when Johnson raised the many deviations to the Policy's arbitrator selection and assignment provisions, the NFL (and NFLPA) refused to provide any "amendment" to Johnson. The NFL has since admitted that no written amendment exists. *See* Doc. No. 103 at ¶ 176; Doc. No. 39 at ¶ 176. Defendants' failure to abide by the Policy's arbitrator appointment and scheduling provisions alone warrants vacatur of the Award. *Avis Rent A Car Sys., Inc. v. Garage Empl. Union*, 791 F.2d 22, 25 (2d Cir. 1986) (a defect in the arbitrator selection method renders the arbitrator "powerless" to hear the dispute and the award unenforceable); *see also Farrell v. Subway Int'l, B.V.*, No. 11 Civ. 08(JFK), 2011 WL 1085017, *4 (S.D.N.Y. Mar. 23, 2011); *Hugs & Kisses, Inc. v. Aguirre*, 220 F.3d 890, 893 (8th Cir. 2000); *R.J. O'Brien & Assoc. v. Pipkin*, 64 F.3d 257, 263 (7th Cir. 1995); *Cargill Rice v. Empresa*, 25 F.3d 223, 226 (4th Cir. 1994); *Szuts v. Dean Witter*, 931 F.2d 830, 832 (11th Cir. 1991).

Because the NFL and the NFLPA did not strictly abide by the Policy's arbitrator selection provisions, Carter had no authority to hear Johnson's appeal. Under the law of this Circuit (and many others), this Court should vacate the Award.

B. Johnson Objected to the Arbitrator Selection Process

Johnson never waived his arguments related to Carter's improper service. To the contrary, Johnson unequivocally objected to Defendants' violation of the Policy's arbitration selection and assignment provisions in a letter he sent the NFL (copying Carter and the NFLPA):

> Again, the NFL seeks to enforce the Policy strictly against Mr. Johnson, while refusing to provide evidence of its adherence to the Policy or legitimate grounds for known deviations. Specifically, the Policy requires the NFL to "select...no fewer than three but no more than five arbitrators to act as hearing officers for appeals under Section 6..." Policy at 13. This group of arbitrators is to select a Notice Arbitrator, who is responsible for assigning one arbitrator "to cover every Tuesday of the playing season through the Super Bowl." Additionally, "[a]ppeals will automatically be assigned to the arbitrator assigned to cover the fourth Tuesday following the date on which the Payer is notified of discipline." Policy at 13. This integral provision has not been followed. Mr. Johnson is entitled to an explanation as to why. Requests 45, 46, and 47 seek to determine whether the NFL has abided by the requirements in the Policy, particularly as it relates to the assignment of the arbitrator to hear his Section 6 discipline appeal.

Ex. 5 at 6, authenticated at Ex. 1 (affidavit of D. Vance) at ¶ 5; *see also* Ex. 2 at 159:11-19, authenticated at Ex. 1 at ¶ 8 (Johnson incorporated his "initial submissions in this case, including the discovery call…" into the arbitration hearing); Doc. No. 116-10 at 3, 5:10-6:25.

Despite Carter's knowledge of Johnson's repeated inquiries regarding arbitrator appointment, he deemed them irrelevant, denied Johnson the information he sought and, in violation of the Policy, exercised arbitral authority. Doc. No. 116-15 at 3. Notwithstanding the NFL's endless and baseless cries of "waiver," no such waiver occurred.

C. The Award Did Not Draw Its Essence from the Policy

Even if Carter had the authority to hear Johnson's appeal, which he did not, he illegitimately exercised his authority. The NFL wrongly contends that arbitration awards are not subject to vacatur under the LMRA where an arbitrator exhibits manifest disregard for the governing labor agreement (Doc. No. 111 at 13). *See Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 93-94 (2d Cir. 2008) (rev'd and remanded on other grounds by *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)). Regardless, the NFL presents no authority for its core assertion that even a legitimately appointed arbitrator may ignore or rewrite the labor agreement.[2]

[2] Johnson previously refuted that he "admitted" a Policy violation. *See* Doc. No. 112 at 8.

1. Carter Based His Award on the "Proffer" of an Amendment He Refused to Require the NFL to Produce

The NFL ignores Carter's acceptance, sight unseen, of a purported Policy amendment eliminating the material requirement of certification of a positive Policy test by the Policy's Chief Forensic Toxicologist. As explained in Johnson's prior briefing and his Reply to the NFLPA's Memorandum of Law in Opposition to Plaintiff's Motion to Vacate an Arbitration Award, Carter's conduct is unjustifiable. In short, Carter only could conclude that the NFL met its burden to demonstrate a positive test by accepting that this unseen, unratified amendment existed. As a result, Carter's Award disregarded the Policy's express terms and must be vacated.

2. Carter Ignored the Policy's Clear Burden-Shifting Paradigm

The Policy plainly sets out a specific burden-shifting paradigm. The paradigm is unambiguous on its face and required the NFL to establish initially: 1) a positive test result; 2) obtained pursuant to a test authorized under the Policy; and 3) conducted in accordance with the Policy's collection procedures and testing protocols and the testing lab protocols. Only after the NFL meets its initial burden does the player have to rebut it. Doc. No. 39-1 at 1799-1800. Despite the paradigm's clarity, the record demonstrates that Carter simply failed to apply this plainly stated and mandatory paradigm. *See* Doc. No. 116 at 19-20.

The NFL does not refute Carter's failure. *See* Doc. No. 111 at 15-16. Rather, the NFL miscasts Johnson's argument as a "disagreement" with Carter's "interpretation" of plain Policy language. Carter's failure to apply a clearly written Policy provision is further evidence of his manifest disregard for the Policy and this Court should vacate his Award. *See Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 77 (1st Cir. 2008) ("[i]f the arbitrator ignores the plainly stated procedural rules incorporated in the agreement to arbitrate while arriving at the arbitral award, that award is subject to a manifest disregard of the law challenge").

3. Carter Flatly Denied Johnson an Express Policy Defense

As the NFL agrees, "the Policy establishes, inter alia, detailed procedures and protocol for testing of players for Prohibited Substances..." Doc. No. 111 at 7. The Policy specifically allowed Johnson to challenge any positive test by challenging whether the lab followed the applicable procedures and protocols. *See* Doc. No. 39-1 at 1800. To do so, Johnson requested the procedures and protocols, which Carter initially denied Johnson but later ordered the NFL to produce. *See* Doc. No. 116-20. Despite this Order, the NFL never produced the protocols.

When Johnson asked Carter to take an adverse inference against the NFL for refusing to produce the lab protocols, Carter refused. By denying Johnson access to the lab protocols, the NFL subverted and undermined the express Policy language. By allowing the NFL to ignore his Order to produce the protocols, Carter demonstrated his bias, rendered the arbitration process fundamentally unfair, and divorced his Award from the Policy's essence.

Carter's refusal to take an adverse inference against the NFL for improperly withholding potentially exculpatory evidence demonstrates his manifest disregard for the Policy. *See Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011) (manifest disregard exhibited where there is a clearly governed legal principle about which the arbitrator knew but did not apply); *see also Brady*, 820 F.3d at 544 ("sufficiently settled" in the Second Circuit that adverse inferences exist in arbitration). Furthermore, by allowing the NFL to disregard his Order (Doc. No. 116-20), Carter unfairly prejudiced Johnson by precluding him from arguing that the lab did not follow the Policy's protocols and procedures. *See Home Indem. Co. v. Affiliated Foods Distribs.*, No. 96 Civ. 9707, 1997 WL 773712, *4 (arbitrators have affirmative duty "to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other party … a failure to discharge this simple duty would constitute a violation of [FAA

§ 10(a)(3)], where a party can show prejudice as a result") (*citing Chevron Trans. Corp. v. Astro Vencedor Compania Vaviera, S.A.*, 300 F.Supp. 179, 181 (S.D.N.Y. 1969)).

The NFL fails to explain how Johnson could assert his Policy right to demonstrate that the lab failed to follow its protocols when the NFL refused to produce the protocols, and Carter refused to enforce his Order requiring the NFL to do so. By specifically ordering the NFL to produce the protocols, Carter acknowledged their importance to Johnson's appeal. Carter manifestly disregarded Johnson's clear Policy right to "challenge the initial showing by the [NFL]" that the lab conducted his test in accordance with the protocols. Doc. No. 39-1 at 1800.

II. CARTER'S CONFLICTS WERE CLEAR, BUT UNDISCLOSED

The NFL does not dispute that Carter failed to make a conflict disclosure to Johnson. Doc. No. 116-1 at ¶ 9; Doc. No. 116-2 at ¶ 19. Instead, the NFL attempts to rely on Carter's claimed disclosures to the NFLPA. *See* Doc. No. 111 at 18. However, as Carter stated, Johnson was a party to his arbitration, not the NFLPA. *See* Doc. No. 39-2 at 1835. Carter owed a duty to disclose to all parties, including Johnson. *Commonwealth Coatings Corp. v. Cont'l Casualty Co.*, 393 U.S. 145, 149 (1968). That the NFL paid Carter's firm WilmerHale in excess of a million dollars only amplifies Carter's obligations to disclose to Johnson information indicative of bias and partiality. *See* Doc. No. 103 at ¶ 188; Doc. No. 39 at ¶ 188. Moreover, Carter never disclosed to Johnson that he worked as an arbitrator under the Defendants' separately defined SOA policy or that his firm concurrently represented the NFL during the time of Johnson's appeal. To the latter point, no amount of "googling" would have revealed Carter's firm's concurrent representation of the NFL.[3]

[3] The NFL's contention that courts do not apply the FAA's evident partiality analysis under LMRA vacatur actions is baseless. *See Ecoline, Inc. v. Local Union No. 12*, 271 Fed. Appx. 70,

The NFL and NFLPA had the right to bargain over the arbitrators. *See* Doc. No. 111 at 18-19. Defendants memorialized that bargain in the Policy's express language. However, the NFL and NFLPA did not have the right to modify secretly the express Policy terms without any ratified amendment and impose them on Johnson. The Policy's terms include the prohibition of affiliated arbitrators -- something the NFL completely ignores. Moreover, the cases cited by the NFL – *Scandinavian* and *Nat'l Indem. Co.* – do not apply because the arbitration agreements in those cases did not include express prohibitions on affiliated arbitrators. *See* Doc. No. 111 at 19.

III. THE ARBITRATION LACKED FAIRNESS

Contrary to the NFL's assertions, this Circuit has not barred fundamental fairness as a basis for vacating an arbitration award under the LMRA. *See Brady*, 820 F.2d at 545-46. While the Court may choose to address this issue, it need not as Defendants negotiated a fundamental fairness requirement directly into the Policy. *See* Doc. No. 39-1 at 1785. The NFL completely ignores the Policy's express requirements of "transparency" and a "fair system of adjudication." Johnson's arbitration, including the numerous hidden deviations from the Policy's express terms, Carter's disregard for clear policy provisions, and Carter's exercise of authority beyond the scope of the Policy, lacked fairness and transparency. As a result, this case demands vacatur.

CONCLUSION

Based on the foregoing and his related briefing, Johnson respectfully requests that this Court grant his Motion to Vacate (Doc. No. 107) in its entirety.

Respectfully submitted,

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71, fn. 2 (2d Cir. 2008); *Skyview Owners Corp. v. SEIU, Local 32BJ*, No. 04 Civ.4642 SAS, 2004 WL 2244223, *4-5 (S.D.N.Y. Oct. 5, 2004).

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 8, 2017 the foregoing was filed using the Court's CM/ECF system. All parties and counsel of record will receive notice and service of this document through the Court's CM/ECF electronic filing system.

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